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Trade in Services: The Case of Transborder Data Flows. Remarks by the Chairman

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TRADE IN SERVICES: THE CASE OF TRANSBORDER DATA FLOWS

The panel convened at 11:00 a.m., April 26, 1985, Karl P. Sauvant** presiding.

REMARKS BY THE CHAIRMAN, KARL P. SAUVANT

I would pay tribute to the organizers of the Annual Meeting for having planned this panel on services and transborder data flows (TDF); recent events have helped to put this subject into focus. In November of 1984 the General Agreement on Tariffs and Trade (GATT) adopted a work program in services which is expected to deal with transborder data flows. In December 1984 the Intergovernmental Bureau of Informatics (IBI) decided to establish an international consultative commission on TDF development, whose first meeting is scheduled for June 1985. In March 1985, the U.N. Conference on Trade and Development (UNCTAD) adopted a work program on services which is likely to focus on transborder data flows of data services as well. This month, the Organisation for Economic Cooperation and Development (OECD) adopted a Declaration on Transborder Data Flows. I would also note a less historic event: last week the U.N. Commission on Transnational Corporations (UNCTC) decided to continue its work on transborder data flows. In light of these points, the TDF issue is certainly in the takeoff stage, and it is appropriate that we should review where we stand, what the issues and interests are and how these issues and interests are being discussed.

The services sector has become the single largest economic sector in all developed market economies and most developing countries. The United States was the first major country to recognize the importance of the services sector, both in its domestic and international contexts. This recognition may be largely attributed to the fact that services account for about two-thirds of the country’s gross domestic product (GDP) and employment. Most services are intangible, disembodied and nonstockable. As a rule, their production and consumption must occur at the same time and in the same place. While this is a serious constraint on tradability of services, international trans-

**Transnational Corporations Affairs Officer, U.N. Centre on Transnational Corporations. Mr. Sauvant spoke in his personal capacity. His remarks were based on a forthcoming book, INTERNATIONAL TRANSACTIONS IN SERVICES: THE POLITICS OF TRANSBORDER DATA FLOWS (1986).
The United States has also introduced the services discussion in GATT, which has resulted in the initiation of a work program on services in November 1984. For proponents of the international services discussion, this represented another breakthrough, because the free-trade persuasion underlined the institution's Articles of Agreements and suits their interests perfectly. It is likely that the next GATT round will have services on its agenda. When actual negotiations begin, I expect that, as in the OECD, special attention will be given to services. Developing countries as a rule strongly oppose inclusion of services in GATT's work program. The overwhelming majority of developing countries have relatively weak indigenous service sectors, which is reflected in the balance-of-payments deficit in this area. These countries fear, therefore, that a liberal services trade regime could hinder the growth of indigenous service industries effectively because international competition could be overwhelming in many instances. In addition, they fear that inclusion of such a new issue of services would shift attention away from negotiations on trade in goods, which is much more important for developing countries and for which an agreed upon work program exists. Although the developing countries could not prevent inclusion of services in the GATT work program, they can be expected to continue to oppose negotiations on trade in services.

Developing countries prefer UNCTAD as the forum for services discussions because they see their interests better represented there, and because UNCTAD already has considerable experience in dealing with a number of service industries. In fact, UNCTAD decided in March 1985 to initiate a work program of services, and it can be expected to pay special attention to TDS as a core service.

Apart from the OECD, GATT and UNCTAD, the TDS issue is also discussed in the International Telecommunications Union (ITU), UNCTC, and IBI. ITU focuses entirely on the technical infrastructure of TDS and has not dealt with economic implications of data services, nor does it seem to have any intention to do so. UNCTC approaches the subject entirely from the point of view of research on the role of transnational corporations in TDS. IBI takes a comprehensive approach which focuses specifically on TDS. For that purpose, IBI established a high-level international consultative commission on TDS development which will meet for the first time in June 1985. IBI is therefore in a position to assume a leadership role in the international TDS discussion which would be to the advantage of IBI's main constituencies, the developing countries.

Most developing countries are only beginning to recognize the importance of data resources in general and data services in particular. They can, therefore, increasingly be expected to adopt policies in this area with a number of them likely to follow the example set by Brazil. In this context, it is of central importance that transnational computer communication systems permit data resources to be accessed internationally. While this, for obvious reasons, facilitates access to data resources located elsewhere, it may hamper the building of domestic data resources. The principal reason is that availability of data resources through TDS may decrease the need to develop such resources locally or may make such local development difficult because of the strength of international competition. In other words, since TDS can have an influence on the location of data resources, any comprehensive national policy aimed at strengthening domestic data resources has to pay attention to TDS. Developing countries, therefore, can be expected to pursue infant-industry-oriented policies which may often be restrictive. The result may well be a proliferation of diverging national policies on TDS.

Most developed countries are in a more mixed interest situation. While most developed countries lag behind the United States in development of most data services, they can benefit immediately from application of data services for their purposes, be it for operations of their transnational corporations or to improve competitiveness of their service industries or to exploit the new tradeability of certain services. The United States can therefore build on a certain commonality of interests with these countries when advancing its quest for a liberal framework for international service transactions.

Work on an international public policy framework for trade and foreign direct investment in data services has begun. It will be a framework which will apply to one of the most dynamic components of international trade, namely trade in data services. It will strongly influence how the informational infrastructure for trade in goods and services will develop, and indeed, provide rules for the increased tradability of certain services. It will define how TDS operations of transnational corporations can be undertaken. It will become an important parameter for domestic policies on data goods and data services and will be a crucial part of a more general framework for development of the services sector in general, the most important economic sector in most countries.

**Remarks by George Coombe**

A few years ago, discussion of TDS "legal issues" focused upon such traditional subjects as harmonization of data protection legislation, rights accorded data subjects, privacy, legal status of data, allocation of liability for data abuse, computer crime and protection of computer software. These subjects continue under review in regional and international fora: the Council of Europe, UNCTC, the U.N. Commission on International Trade Law (UNCITRAL), the World Intellectual Property Organization (WIPO), the International Telecommunications Users Group (INTUG) and IBI.

I do not wish to recite a litany of legal issues involved with each subject nor the progress, or absence of progress, of their resolution within a particular tribunal. Rather, I wish to focus attention on a preliminary problem faced by every agency engaging in TDS study and analysis: the context within which, and the procedures whereby, underlying legal issues will be identified, defined and addressed. My major premise is that no TDF legal issue today can be considered apart from national, regional and international policy goals, goals essentially economic in nature and addressing such matters as national treatment, performance requirements, discrimination, market access, investment opportunity and transparency. In short, TDF legal issues must be placed within the economic context provided by international trade and investment. Resolution of those issues must await declaration and harmonization of international trade and investment goals. In support of this conclusion, consider, first, the experience of the OECD and its continuing attempt to identify and address TDF legal issues.

The OECD Legal Aspects Work Program, begun in 1981, represents the most ambitious international effort to identify and address legal issues underlying the transborder flow of data. That effort derived in part from insight obtained in the successful adoption of the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data. In light of the focused and pragmatic approach undertaken to produce the guidelines, it was expected the work program also would proceed pragmatically to identify indicated priorities relevant to OECD objectives set.

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forth in its statement of aims. Those objectives expressly include the need "to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations." Accordingly, it was reasonable to assume legal issues, when identified, would be addressed with that important economic objective in mind. U.S. representatives participating in the effort manifested their expectations regarding work program procedures:

The immediate priority should be the identification of those TDF legal problems that, in fact, do exist;

A comprehensive inventory of TDF legal issues already under examination by other regional and international institutions should be prepared and maintained to avoid duplication of effort;

Any perceived legal issue identified must first be examined in light of existing international legal principles to determine if there has been an indicated breakdown in their application;

Private sector participation should be encouraged throughout the program; and

New national or regional legislation which might alter traditional telecommunications practices should be discouraged by the OECD pending orderly resolution of the pertinent legal issues addressed.

Shortly before the advent of the work program, economic and trade implications of TDF came under increasing scrutiny within the OECD. Thereafter, the Expert Group on Transborder Data Flows of the OECD Working Party on Information, Computer and Communications Policy (ICCP) addressed an increasingly ambitious agenda for examining economic aspects of TDF. U.S. initiatives responsive to these economic and trade issues recognize European self-interest regarding creation, processing and transmission of data and manifest overall concern by the U.S. private sector for future opportunities abroad in the marketing and use of telecommunication equipment and systems. Accordingly, the U.S. Government position within the OECD has been, and continues to be, to urge the ICCP to proceed cautiously in a study mode rather than to begin a rapid search for international control measures.

Further, the United States prepared and delivered to the ICCP Expert Group a proposed data declaration to be issued in conjunction with the OECD's annual trade declaration. A primary U.S. objective in advancing this data declaration was to obtain a firm commitment from the industrialized nations to maintain free information flows and to use that commitment as an intellectual point of departure for future OECD address of all TDF matters, including legal issues.

Unfortunately, these well-defined U.S. initiatives with regard to both legal and trade issues have not received a sympathetic response from the OECD Secretariat. The Secretariat should have placed legal issue inquiry within the desired conceptual framework: identification of laws, regulations, policies and practices that will promote and not impede flows of information. Instead, predictable difficulties resulted from the issuance of the Bing Report in 1981, an attempt to adopt an overall approach to TDF such efforts. The report illustrates a studied attempt to advance analysis through gestion of underlying problems. A more recent OECD effort, the Siggart Report, proceeds from the same false premises.

Returning to trade issues, the declaration on free international data flows, proposed by the United States and patterned on the time-honored OECD trade declaration, met lukewarm support from most delegations and suspicion by some. However, after nearly two years of studying the economic, political and legal policy questions in-

volved in endorsing such a declaration in the form of a less formal, more generalized statement of agreed intent, many OECD members have indicated tentative support.

The final draft of the statement manifests an intention by member countries to:

Promote access to data and information and related services, and avoid the creation of unjustified barriers to the international exchange of data and information;

Seek transparency in regulations and policies relating to information, computer and communications services affecting TDF;

Develop common approaches for dealing with issues related to TDF and, when appropriate, develop harmonized solutions;

Consider possible implications for other countries when dealing with issues related to TDF.

Last year, the working party issued a preliminary paper suggesting work that could be done on problems concerning conflicts of jurisdiction and law in the field of TDF, and their possible solution. Recognizing the heterogeneity of legal matters affected by TDF and the need to establish mutual assistance and cooperation procedures among the member nations to address them, the working party relates its legal issue objectives to the work of ICCP (addressing TDF trade and economic matters), the Committee on International Investment and Multinational Enterprises (addressing repercussions on international investment resulting from contradictory legal requirements imposed by countries on multinationals enterprises), and the Committee on Restrictive Business Practices (addressing restrictive business practices affecting international trade). The paper concludes with a pragmatic observation:

It is therefore necessary to consider the areas of national regulations that are specific to TDF, remembering that any conflict of requirements due to extraterritorial laws and regulations adopted with a view to domestic economic objectives (taxation, banking, general regulations concerning and affecting companies, raw materials markets, competition, international civil aviation and shipping) or other objectives such as national security or foreign policy is included in the scope of the Recommendation pertaining to restrictive business practices and the Guidelines for Multinational Enterprises.

Accordingly, in keeping with indicated U.S. priorities, it appears future OECD TDF legal issue analysis properly will be subsumed within the broad reach of economic and trade considerations. The OECD has provided the major forum for address of TDF matters in the immediate past. The future may mark a shift to the GATT as the medium by which international commercial and trade cooperation can be obtained to assure resolution of most TDF issues, including legal issues. Certain legal issues will permit discrete address by international organizations uniquely qualified to consider their implications. UNCTAD and its preparation of a guide to legal issues underlying electronic funds transfer, and WIPO and its work on the legal protection of computer software, provide convenient illustrations. However, final address even of these discrete legal issues must await ultimate resolution of attendant international and trade considerations. An apparent exception that proves this rule is provided by the one legal issue, privacy, where application of regional legislation is imminent, the Council of Europe International Convention on Data Protection.

The convention's most disturbing element or principle is that restricting TDF. Thus, TDF is permissible only between those nations which have ratified the convention, i.e., between nations having domestic legislation containing identical data protection laws. Thus, even if the convention's so-called basic principles for data protection are reflected in a given nation's domestic laws, TDF to that nation may be denied by
another if the latter has adopted a reservation concerning certain convention provisions and the former's laws fail to provide an "equivalent protection." Obviously, the requirement of identical legislation will not further the solution of worldwide data protection problems (as opposed to those within the Council of Europe membership) with regard to TDF. If an equivalent protection test could be pursued, particularly with regard to those nations which adopt the OECD guidelines, a pragmatic approach may be suggested. However, no such approach, at present, can be inferred from the convention language or the accompanying explanatory report. Indeed, the principle of equivalent protection, absent a delineation of maximum standards permitted, may well encourage ascending levels of national protection which, when coupled with discretionary sanctions and remedies, may actually encourage TDF constraints. In short, the convention fails to discourage or inhibit overregulation, permits deviations from basic principles, leaves sanctions and remedies to the discretion of each member state and seriously constrains TDF.

The trade and investment implications of all this, and the possible constraints upon TDF outside those Council members ratifying the convention, already have been recognized in the 1984 U.S. Trade Act. That act expressly authorizes the President to address the proliferation of nontariff barriers to trade in services including "restrictions on the use of data processing facilities," and "direct or indirect restrictions on the transfer of information." Section 301 of the act has been extended to authorize the President to take action to respond to any foreign government policy of a protectionist nature. The act also authorizes the President to promote bilateral and multilateral trade negotiations to remove foreign barriers to U.S. service export, including data processing requirements and other barriers to international information flows. In light of the foregoing, it is reasonable to assume attention will now focus upon GATT.

The efforts of the Office of the U.S. Trade Representative to include trade in services on the agenda for a new round of multilateral trade negotiations provide a convenient point of departure. Last year the United States submitted to GATT a National Study on Trade in Services which outlined several obstacles to trade in telecommunication and information services including regulation of international data flows, regulation of information competition, discriminatory standards and restrictions on the use of foreign data processing facilities. Parenthetically, it should be noted the OECD Statement of Common Intent is an attempt to reduce tariff and nontariff trade barriers among the OECD countries. The national study, on the other hand, advocates the use of the GATT Standards Code as a model for an international agreement designed to ensure that domestic regulations are transparent and administered fairly. The purpose of the Standards Code is to encourage signatories to remove unnecessary obstacles to trade that may be created by technical regulations, testing methods and procedures, and certification schemes. Of all the codes negotiated during the Tokyo Round, this one has the highest number of signatories, including the greatest representation from developing countries. The U.S. private sector supports the GATT Standards Code as a model to encourage open international marketing of information processing and telecommunications equipment on a fair and competitive basis without restrictive trade barriers.

A recent paper prepared for the Bankers Association for Foreign Trade provides an appropriate summary:

[The U.S. proposal to actively work toward freer information flows through GATT is logical and constructive. It recognizes the economic reality behind the effects, as well as many of the causes, of regulation of information flows, and it suggests a concrete course of action in a field often characterized by hand-wring-

ing. Concentrating on the trade-related aspects of these problems has the advantage of providing a ready framework and vocabulary for dealing with an otherwise diffuse, ill-defined and poorly understood set of problems. This approach could also help to raise awareness of information flow issues in both the public and private sectors, and to develop the necessary momentum to deal with these issues in a comprehensive fashion.

An understanding of these realities places TDF comfortably within the larger context provided by trade in services, precisely where it belongs.

**Remarks by Lucy A. Hummer**

It is a pleasure to talk about the OECD and its work in TDF, particularly the declaration on TDF adopted by the OECD recently. I would also like to explain what we see as the problems still remaining and the role of multilateral institutions in helping to resolve them.

Transborder data flow, or international computer-aided transmission of information, is an end result of technological advances in computer equipment, software and services, on the one hand, and telecommunications equipment and services on the other. There is no TDF industry as such. Internationally, use of computer technology in facilitating transborder flows of data and in providing information services has become dependent on national policies governing use of communication links between the computer in one country and its user or another computer in another country. The U.S. model for these data flows is one in which the U.S. information industry has become the world leader in innovation and expansion.

Several years ago, as the OECD was finalizing its Guidelines on Transborder Data Flows and the Protection of Privacy and just beginning its inquiry into nonpersonal data flows, the United States proposed that the OECD adopt, as an interim measure, a data declaration. Examination at that time had shown that telecommunications, as a service sector, was relatively free of restrictive regulations which would inhibit flows, although several OECD countries had under consideration measures which could change the situation. Since no analysis had been undertaken by any international body as to the significance of data flows to the operations of multinational corporations, or even smaller firms, or other economic factors such as employment, productivity or trade, the U.S. position was that regulation in such a state of uncertainty was unwise. Our proposal for a data declaration called, in essence, for countries to forbear from regulation while the OECD studied the issues.

I was one of the original drafters of the U.S. proposal. In fashioning our proposal we drew on two documents which had already been accepted by the OECD—the privacy guidelines and the trade pledge. We thought what we were asking for was a very reasonable small step. It was, after all, not a binding legal document, but a non-binding statement of political will. I was surprised by the initial negative reception of our document and the high level of suspicion of the motives of the United States. Many in Europe saw the data declaration as a strategy to preserve U.S. preeminence in communication and information services. The European Economic Community (EEC) was quite blunt in saying that asking Europe to adopt the data declaration was like asking Europe to fight with one hand tied behind its back. As negotiation turned

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into a process of years, I began to despair that a meaningful document would ever be adopted.

The situation turned around, but only slowly. The phrase "the free flow of information" dropped out. Although this phrase has almost a hallowed meaning in the United States, it is an ambiguous term and is not held in the same high regard by others. The final document, however, does recognize that computerized data and information now circulates, by and large, freely on an international level and that this should continue. Canada made a very helpful contribution to the dialogue by introducing the concept of "access" to data and information and related services. This helped assuage some of the concerns of European countries about being cut off from access to data bases in the United States, as had occurred in the pipeline case. Access questions are still a very emotional subject for our European partners, and we should not underestimate the level of their concern with export control measures which affect access to data.

The document also declares the intent of OECD countries to seek transparency in regulations and policies relating to information, computer and communications services affecting TDFS. This is a very broad statement, but extremely important, for it covers not just transparency in data flow regulations but transparency in all areas that can affect data flows, such as standards, tariffs, and in-country data processing requirements. The statement on transparency directly addresses a concern of U.S. industry that countries would seek to impose nontariff trade barriers not really for the purpose stated, such as privacy protection, but really as a means of excluding U.S. firms and services to foster development of local industry.

The document ends with a section of methodology for further study, introduced by France. This is a section we thought unnecessary in a statement of intent, and so did many of our other OECD partners. Nevertheless, since it is part of the document we will be prepared to participate in the further work called for in the same spirit of cooperation in which the document was negotiated.

The adoption of the OECD declaration does not end U.S. concern about the reasons that prompted us to introduce it—the specter of regulation is still with us as, even in Europe, serious thought is being given to the future role of telecommunications monopolies. In the United States, as technology has undermined the need for monopolies, governmental policies and rules have changed to accommodate competition. The debate is not on whether competition is desirable but on what individual policies and rules should be amended or removed to meet a changing environment. We have come increasingly to believe that the major objective of regulation—to provide the highest quality products at the most reasonable prices to the greatest number of consumers—may best be achieved by allowing competition to govern.

We believe competition stimulates innovation, advances technology, expands markets, lowers prices, satisfies specific customer demands, and reacts rapidly to changing technological and market forces. Regulation, on the other hand, embraces the status quo and limits private incentive to innovate. Regulation discourages any incentive to cut costs or increase efficiency. The regulatory process is also slow in reacting to changes, causing inefficiencies in the marketplace.

A minimum of regulation and government intrusion into the marketplace has many positive benefits. The convergence of data processing and data communications has increased the ability of international business to communicate between computers, thus increasing the speed and decreasing the cost of communication. International communications benefit firms whether they produce goods, services or both. Both types of firms benefit from improved financial reporting and management, inventory control, marketing, product distribution, research and development, more efficient administration such as centrally located payroll systems, general decisionmaking regarding the type and size of investments a company may wish to make and the ability to take advantage of economies of scale through manufacturing and assembly at different locations.

Businesses can also disperse geographic locations of headquarters and operating units and conduct business at more remote locations. Telecommunications and information services are factors which make these operations possible. Firms can undertake projects which were formerly too risky, since senior management gains an improved ability to monitor a situation and make decisions from distant locations.

At the same time, this makes businesses more dependent on data flows and communications links between a parent and a foreign subsidiary. There is no empirical study to measure the importance of these factors relative to other incentives to operate abroad. The absence of such data, however, also implies that governments which choose to intervene in the marketplace by assisting or restricting firms' use of international communications and information services may have no idea whether the measure they adopt will achieve the results they seek.

It is hard to imagine what, if any, benefits accrue to U.S. firms because of data flow restrictions. The principal costs of data flow restrictions are the costs of creating and maintaining redundant data bases, acquiring and maintaining data processing capacity within a country which has restricted data flows to perform functions that would otherwise be performed by centralized equipment, and duplicative software and development. These costs bear particularly heavily on service firms, especially on those whose service is the provision of the data flows themselves.

The U.S. Government has been trying to categorize the kinds of regulatory restrictions which can impede the international flow of data. The examples we have found generally seem to fall into four categories:

1. Regulation of international data flow. Many countries have considered adopting policy measures that either prohibit the inflow or outflow of certain kinds of information or which effectively raise the cost of transmitting information across national borders to such a high level that the flow ebbs. For example, several countries have suggested that they might tax the value of transborder data flows. Similarly, several telecommunications monopolies have suggested they might charge for the use of private leased lines on a modified volume-sensitive basis instead of a flat rate. Users estimate that in the case of one country this would increase the costs of transmitting data by about 700 percent, making many current operations uneconomical to maintain.

2. Regulation of information competition. In Europe, indeed in most of the rest of the world, telecommunications services are still provided by government-owned or controlled postal, telegraph and telephone (PTT) monopolies. They must interconnect at this end with a U.S. provider of services. Here, we have more than one provider of international telephone, telex and data services. All compete with each other for a share of the international market. Other governments sometimes choose to limit the scope of services that might be provided. For example, most countries restrict the shared use and resale of private line capacity because such efficient use of capacity denies them business and thus revenue. Such a policy can hurt the competitiveness of the small and medium-sized firms that do not have the financial resources or the need for full-time private line service, but could make optimum use of facilities on a shared basis. Another concern for the United States is that foreign PTTs might use their monopoly power to try to limit the providers of certain new international services. U.S. providers of these services are concerned that they could be whipsawed by artificially imposed restraints on the number of service providers who can serve a
foreign market. There is a concern that foreign PTTs might obtain a majority of revenues by playing service providers against each other. U.S. supporters of unrestricted information flows are also concerned that foreign PTTs might secure operating privileges in the United States for their subsidiaries and then, through the use of their monopoly power overseas, exclude all U.S. competitors from competing for the business of transmitting information between the United States and their home countries.

(3) Discriminatory standards. A number of governments have established standards for telecommunications-related services that depend on public communications facilities. Standards are sometimes designed to impose an indirect barrier to foreign companies. In the alternative, they are sometimes administered in a way that is purposefully discriminatory. Another area of U.S. concern relates to regulations affecting use of privately owned equipment for connection to the public telecommunications network. Regulations can be devised which severely limit the type, make or design of equipment acceptable for interfacing with the domestic system. This, in turn, influences the type of communications and data services that can be provided on a cost-effective basis.

(4) Restrictions on the use of foreign data processing facilities. Many countries have adopted or are considering legislation that would restrict use of computer facilities located in other countries, either for data processing or for information retrieval. If companies must duplicate their equipment and data processing facilities in each processing center, many benefits of technology are lost, and costs rise dramatically.

Now that we have the data declaration at OECD, and a categorization of the kinds of regulations or proposed regulations we think could frustrate the unrestricted flow of data, where do we go from here? Heretical as it may sound, some of us in the government are beginning to question the usefulness of dialogue on specific regulatory issues in multilateral forums. I do not think we are alone. The basic problem is that the traditional forums for multilateral discussion, such as the GATT or the ITU, simply move too slowly to accommodate changes forced by the advances in technology. The ongoing discussions between the United States and Japan on opening the Japanese telecommunications market are a case in point. The kinds of discussions we have been having over Japanese regulations on standards and criteria for equipment approval cannot be accommodated within the standards-setting organs of the ITU. A Japanese speaker at an ITU Conference in Washington recently voiced his opinion that the future would see more bilateral discussions on the model of the U.S.-Japanese discussions, and I agree. The ITU Legal Adviser, at the same conference, also stated that the traditional standards-setting bodies in that organization are not geared to the pace of technology. In recent talks with an EEC task force, we have heard them say that in trying to develop a harmonized telecommunications regime for Europe, they cannot afford to wait for discussions in the ITU or other international bodies.

Telecommunications is in a state of flux in Europe. While deregulation on the U.S. model will never be adopted in Europe, I think we will see some liberalization—perhaps breaking the postal monopoly from the telephone, and permitting private initiatives in some telecommunications services. Such developments will present new markets and new challenges, and I see most of the international dialogue, when this happens, being of a bilateral rather than a multilateral nature.

COMMENTS BY ADHEMAR GABRIEL BAHADIAN*

I have been involved in multilateral trade negotiations for 20 years. The points coming to mind as I digested the papers are several. There is a difference in approach between the developed countries, and particularly the United States, and the developing countries on trade in services, of which TDF is only one aspect. This problem in approach has been with us since the end of World War II. The speakers have mentioned the advantages and disadvantages inherent in regulatory schemes. The situation is not simply that some countries favor regulation, whereas others oppose it. Rather, it depends upon the issue.

In the trade in services, TDF area, the United States and other developed countries are against regulation. This is because the United States dominates TDF and transfer of technology. On the other hand, the position of the developing countries is different. The state of underdevelopment can be overcome, and it can be overcome by protective regulation. In this regard, I would recount the position taken by the then Secretary of State, Henry Kissinger, before the General Assembly. Mr. Kissinger's premise was that developed countries had a vested interest in protecting technology as a "raw material," and they did it through regulation.

I challenge the premise of the speakers that minimal regulation is good. Indeed, the proposal to refrain from regulation is not substantiated by the practices of the United States and developed countries. I refer particularly to the 1984 Trade Act. If I were unfamiliar with this act, and if I had been asked to examine it and to guess what country would have enacted such legislation, I would have replied, "Brazil," or any other developing country. The law is very protectionist of U.S. interests. I particularly question the provision in the act allowing any U.S. enterprise to challenge in U.S. courts the trade policy of another country as being discriminatory. Notably, in the area of services, the law has not defined unreasonableness, and there is no international standard to serve as a measure. As an aside to this point of intellectual standards, at the meetings in Geneva concerning the revision of the Paris Convention sponsored by WIPO, one of the delegations responsible for the failure of the negotiations was the United States itself.

With respect to the last session of the UNCTC, the Chairman himself can testify that the developing countries tried to get Capitalist/Socialist countries to discuss TDF without success.

Developing countries are not trying to undermine the foreign investment system, or the legal protection of property rights. Rather, they are asking for fairness in the recognition of their legitimate development interests.

COMMENTS BY SEYMOUR J. RUBIN**

In at least one respect, comment on the papers presented by the panelists is simple. All agree on the present and increasing importance of TDFs and on the complexity of the issues involved. Moreover, all agree on the fundamental importance of the United States, first, and the developed nations, next, while the Chairman points out the interest of developing countries in building their own national data bases and points to the conflicts which this policy may create with a traditionally "liberal," or open, trade policy, based fundamentally on the principles which actuate the GATT.

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**Executive Vice President, American Society of International Law; U.S. Delegate to the U.N. Commission on Transnational Corporations. Mr. Rubin spoke in his personal capacity.
Another conflict, pointed out by several, is that between the right, or the privilege, or the desirability in a civilized community, whether national or world, of privacy, as against the desirability of an open trading community of nations and private institutions. When one compares the possible effects on world trade and investment of the methodology of the Council of Europe Convention adopted in January 1981, and its constraints on TDFs involving nations outside the convention, with the need, in the interests of a growing world economy, to maintain an open flow of information, doubts may well arise as to what is the likely direction. This is particularly so when the effect of national laws, based more on the desire to establish independent national data bases than on the desire to maintain a free flow of information, is considered.

There are additional considerations. One of these, of more than marginal importance, is national security. Another is the relationship between the information itself and the hardware or the communications methods which transmit that information. The influence of PTTs is not minimal.

As has been suggested, all this implies the desirability, perhaps the need, to consider TDF issues in context—the context of international agreement on services, or at least a common approach to the growing services sector in international economic affairs and, as Mr. Coombe points out, in the context of what actually happens, what is affected, and what may be the nature of an analysis which is inductive rather than deductive—which does not establish principles first but proceeds on the more modest but realistic basis of trade and investment considerations. To a certain extent, as the Chairman mentions, that is pretty much what is happening in the UNCTC—where he happens to be in charge of a program which is close to unique in drawing little criticism from either developing or developed nations. Meanwhile, as is said of the cross-eyed javelin thrower, the subject bears watching.

**DISCUSSION**

A speaker from the floor presented two questions. First, what did it mean to have a work program and second, in the intergovernmental units such as GATT, etc., where did industry have an opportunity to speak? The CHAIRMAN explained that in the GATT, a work program was a number of people working on a problem trying to identify issues which would be addressed in formal negotiations. Regarding industry opportunities to be heard, they were plentiful and appeared many places. Primarily, each national delegation had its procedures for obtaining industry positions from special representatives from industry groups or directly from affected enterprises.

DAVID G. GILL* complimented the Chairman and the panel on an excellent program and referred Mr. Coombe to his paper where he discussed the OECD's working groups' investigation of the extraterritoriality issue in the context of the restrictive business practices provisions and others relating to this issue. He asked whether this reference was to OECD's requirement of notification, consultation and cooperation when there were conflicting national requirements in this area. If so, had there been any such consultations and notifications yet utilized or were there any plans for them? Mr. COOMBE replied that he had referred to the application of the Council of Europe Convention, not the OECD privacy guidelines. Mr. COOMBE rephrased the question: What was the relationship of the constraints and rules in the Council of Europe Convention vis-a-vis the nonconvention countries? This raised a serious question. For example, in West Germany, the state and federal authorities said that under the statutes, there could be no direct automatic transmission of data out of West Germany directly. It must be processed in West Germany as a condition precedent to moving it out. Therefore, for example, there was a concern whether West Germany would place restrictions on movement of data from West Germany to London. He observed that the Germans were not implementing this position, nor had they threatened to do so. But they recognized that under the statutes and their clear legislative interpretation the possibility existed. The same thing could take place with respect to the Council of Europe Convention. A major reason that the protective language was included in the Trade Act of 1984 was to create an in terreto effect within the Council of Europe so that it would not try to impede data flows to the United States. The United States had no comprehensive data protection statute. The United States did not even have a body of law, particularly at the federal level, responsive to the expectations of that convention or to the concerns of data commissioners in a number of the Council of Europe states. Mr. COOMBE believed there had to be some reappraisal in this area if serious complications with respect to the movement of data were to be avoided. Many U.S. multinationals had adopted far-ranging privacy protective measures sympathetic to the needs of the European data commissioners. Whether that was going to be enough in the absence of federal legislation remained to be seen.

Mr. COOMBE asked Ms. Hummer whether there was U.S. Government concern over the fact that there was no U.S. legislation dealing with the Council of Europe Convention. Ms. HUMMER responded that the U.S. Government had mounted a vigorous effort two or three years previously to explain how personal data was protected in the United States. It went through an exercise of getting more than 180 multinationals and trade associations to associate with the principles and the guidelines. At that time, the protective shield rationale presented by the U.S. Government to the Europeans won together constitutional protection, state statutes, the Federal Privacy Act and other legislation like the Fair Credit Reporting Act. This seemed to satisfy most Europeans. At the OECD guidelines meeting in 1983 the United States had tried to discuss whether additional problems would surface when the Council of Europe Convention came into being, but it had had no success. The CHAIRMAN observed that the Council of Europe Convention would come into force within the next two months, and a formal observance had been scheduled for June 1985.

PETER D. TROOBOFF* questioned Ms. Hummer on her comment on European sensitivities on export controls. He asked for her observations on the overlap between U.S. export restrictions, especially since the United States was about to have a new statute to put even more restrictions on data flows in the name of military critical technologies, and the Council of Europe guidelines. Ms. HUMMER said that one thing that might happen was that in terms of data flow restrictions it would make it increasingly difficult for U.S. companies doing business in Europe. It would highlight as "U.S." those European subsidiaries considered in many countries as essentially local companies.

CYNTHIA C. LICHTENSTEIN** asked Mr. Bahadian to detail what he considered the developing countries' development interests in this form of technology. She wanted to clarify whether he was actually referring to the question of say, pricing, i.e. the Intelsat issues. She found it difficult to understand how domestic regulatory laws advanced the interests of developing countries in the case of this form of technology. Mr. BAHADIAN identified two basic objectives of the regulations of developing countries: to obtain access to new technologies and to assure the countries that the so-

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called "transfer of technology" was in fact a transfer of technology. The regulations allowed the countries to be selective and to determine that the technology transfer which was permitted would be beneficial, not only to the economic interests of the country, but also to its process of development. The CHAIRMAN approached the same question from a different view. The answer depended upon one's evaluation of the importance of data resources, i.e. hardware and software. If it was true that data resources were at the center of economic restructuring, then obviously every country would have an interest to maximize the location of data resources in its territory. This could happen through importation or the internal development process. But if it were deemed a crucial economic resource of the future, countries would make every effort to acquire data resources, be it for location or, as the Canadians were trying to do it, through access. It was in this context that many developing countries simply opted for building up at least certain data resources, not all, and undertaking whatever regulation that was necessary to achieve it. Even some developed countries such as West Germany were doing that for precisely the same reason.

LUÍZ DILÉRMANDO DE CASTELLO CRUZ* asked how the developing countries were going to pay for the free flow of information. The CHAIRMAN replied that the question related to the much larger question, beyond the charter of the panel, on the resolution of the international debt crisis. On an allied point, Ms. Hummer observed that a substantial amount of TDF was not trade-related data but intracorporate data such as that between a parent and a subsidiary. This had proved to be a very controversial topic and one not otherwise directly addressed in the panel. The CHAIRMAN commented that an estimated 80 to 90 percent of all TDF took place internally to companies and that this data constituted trade in data. Domestic regulation would address this type of data flow. The issue was how did one value intracorporate data flow services.

JOHN H. JACKSON** commented that he was really quite surprised by the trend of the discussion in the preceding few interventions because the emphasis seemed to be just as one could imagine in early days of trading in which each country pursued its own interests, designed measures to try to capture for itself the maximum advantage as it perceived its interests, and in the process, the whole world suffered. The whole point of what economists had told us for many many decades, if not centuries, was that there must be cooperative effort to reduce individual barriers so that one could achieve economies of scale and other advantages of economics. He did not see that reflected in the discussion. He saw each comment offered addressing how each country was going to go its own way.

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